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NEPA Draft Report Comments  
c/o NEPA Task Force  
Committee on Resources  
1324 Longworth House Office Building  
Washington, DC 20240

Members of the NEPA Task Force:

On behalf of the EPA Region IV Regional Tribal Operations Committee (RTOC), enclosed please find our comments regarding the Initial Findings and Draft Recommendations as proposed by the Task Force on Improving the National Environmental Policy Act. The RTOC consists of six Tribes in the southeastern United States; the Catawba Indian Nation, Eastern Band of Cherokee Indians, Miccosukee Tribe of Indians of Florida, Mississippi Band of Choctaw Indians, Poarch Band of Creek Indians, and the Seminole Tribe of Florida.

In general, the tone of the recommendations appear to make an attempt to focus and streamline the NEPA process. While such changes may be appropriate, the true intent of NEPA should not be forgotten in efforts to complete the NEPA process in a more timely and economically feasible manner. As you continue to consider amendments to this policy, we encourage you to initiate significant consultation with Tribes as tribal views may vary significantly from those of the public given the sovereign status of Tribes and the unique government to government relationship between Tribes and the federal government.

Thank you for your careful consideration of the Committee comments. Please feel free to contact me at 305-223-8380, ext. 2243, should you require any additional information.

Sincerely,

Steve Terry  
Region IV RTOC Chair

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## COMMENTS REGARDING DRAFT RECOMMENDATIONS OF THE TASK FORCE ON IMPROVING THE NATIONAL ENVIRONMENTAL POLICY ACT

Recommendation is following by Committee comment.

### **Addressing delays in the process**

Recommendation 1.1: Amend NEPA to define “major federal action.” Definition would only include new and continuing projects that would require substantial planning, time, resources, or expenditures.

Comment: We agree that some clarification in determining what constitutes a major federal action may be useful; however, amending NEPA to provide a clear definition of a major federal action would be challenging and may result in a definition that is not broad enough to include all matters of concern, including areas of cultural significance. If a definition were to be developed, language should be added to address actions not included in the definition in other areas, such as the in categorical exclusions process. Consultation with Tribes in the development of this definition would be critical to ensure unique tribal concerns are addressed.

Recommendation 1.2: Amend NEPA to add mandatory timelines for the completion of NEPA documents. Time to complete an Environmental Impact Statement (EIS) would be limited to 18 months; time to complete an Environmental Assessment (EA) would be capped at 9 months. Council on Environmental Quality (CEQ) would be able to extend time, but no longer than 6 and 3 months, respectively.

Comment: We do agree that NEPA should be amended to include mandatory timelines. However, sufficient time is required to allow for necessary research and analysis in order to produce a scientifically sound document that thoroughly examines environmental impacts and which can be upheld in the court system if challenged. The timeline should be extended an additional 6 months for EIS and 3 months for an EA.

Recommendation 1.3: Amend NEPA to create unambiguous criteria for use of Categorical Exclusions, EAs, and EISs. Amendment would make clear differentiation between requirements for each.

Comment: Providing unambiguous criteria for the use of categorical exclusions, EAs and EISs is a good idea in theory; however, there would need to be significant tribal consultation on the development of this criteria and on how federal agencies would carry out the implementation.

Recommendation 1.4: Amend NEPA to address supplemental NEPA documents.

Would limit supplemental documentation unless certain criteria (substantial changes in proposed actions that are relevant to environmental concerns and there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts) are met.

Comment: Limiting supplemental documentation is acceptable with this Committee.

### **Enhancing public participation**

Recommendation 2.1: Direct CEQ to prepare regulations giving weight to localized comments. Issues and concerns raised by local interests should be weighted more heavily than comments from outside groups and individuals not directly affected.

Comment: NEPA currently includes a process for participation of local interests. There is a unique government to government relationship between Tribes and the federal government that does not include state and local interposition. As such, weighting local government comments more heavily may jeopardize the balance of Tribes' existing government to government relations with the federal government. Secondly, the above recommendation is too broad as written, and does not provide critical information needed for a thorough response, such as what is regarded as the local community. With respect to Tribes, the local community should be limited to the tribal community in the NEPA process.

Recommendation 2.2: Amend NEPA to codify the EIS page limits set forth in 40CFR 1502.7. EIS would be limited to 150 pages, with a maximum of 300 pages for complex projects.

Comment: Clarity is needed in this recommendation as it is not clear if the limitation includes supporting document and appendices.

### **Better involvement for state, local and tribal stakeholders**

Recommendation 3.1: Amend NEPA to grant tribal, state and local stakeholders cooperating agency status. Requests for cooperating agency status would have to be granted, barring clear and convincing evidence that the request should be denied.

Comment: We do not agree with the recommendation to approve cooperating agency requests barring clear and convincing evidence that the request should be denied. Many tribal government applications to federal agencies trigger the NEPA process. Forcing federal agencies to accept any requesting local government as a cooperating agency will result in an unmanageable process and may interfere with the federal duties and responsibilities of the federal government to Tribes.

Recommendation 3.2: Direct CEQ to prepare regulations that allow existing state environmental review process to satisfy NEPA requirements. If state environmental reviews are functionally equivalent to NEPA requirements, state reviews would satisfy

NEPA requirements.

Comment: We do not agree with the recommendation to develop regulations that allow state environmental reviews to satisfy NEPA requirements. Federal policy is based on a constitutionally defined relationship with Tribes that recognizes and acknowledges tribal sovereignty. Several states do not acknowledge tribal sovereignty of Tribes within state boundaries and attempt to impose state jurisdiction over tribal lands. Allowing state NEPA laws to satisfy federal policy requirements may encourage such states to attempt to impose their requirements on tribal lands.

### **Addressing Litigation Issues**

Recommendation 4.1: Amend NEPA to create a citizen suit provision. If implemented, provision would: require demonstration that evaluation was not conducted using best available science and information; clarify that parties must be involved throughout process in order to have standing; prohibit a federal agency from entering into lawsuit settlement agreements that forbid or limit activities for business not apart of initial lawsuit; establish clear guidelines on who has standing to challenge an agency decision; and establish a reasonable time period for filing a challenge.

Comment: This recommendation does not provide sufficient information for a thorough comment. The current expense and delay for tribal proposals that require federal approval is already enormous. Allowing additional lawsuits will likely add to this burden. Additional delay and expense is inconsistent with attempts to improve the NEPA process. Should the Task Force move forward with this recommendation, we encourage significant consultation with Tribes in the development of guidelines in the citizen suit provision.

Recommendation 4.2: Amend NEPA to add a requirement that agencies “pre-clear” projects. CEQ would become a clearinghouse for monitoring court decisions that affect procedural aspects of NEPA.

Comment: Amending NEPA to require agencies pre-clear projects is not needed and may potentially add to existing delays and expenses. Agency NEPA handbooks have been developed to define policy according to applicable court decisions.

### **Clarifying alternative analysis**

Recommendation 5.1: Amend NEPA to require that “reasonable alternatives” analyzed in NEPA documents be limited to those which are economically and technically feasible. Alternative would not be considered unless supported by feasibility and engineering studies, and be capable of being implemented after consideration of cost, existing technologies and socioeconomic consequences.

Comment: While this Committee understands the need for limiting reasonable alternatives to those which are economically and technically feasible, clarification needs to be added, based on tribal consultation, that includes provisions for culturally

significant areas. Alternatives that address such areas should not be dismissed for lack of above-defined support studies.

Recommendation 5.2: Amend NEPA to clarify that the alternative analysis must include consideration of the environmental impact of not taking an action on any proposed project. Extensive discussion of the no action alternative would be required.

Comment: This amendment is not necessary; most agencies currently include discussion of the no action alternative in the NEPA documents.

Recommendation 5.3: Direct CEQ to promulgate regulations to make mitigation proposals mandatory. Mitigation proposals would be made a binding commitment in order to proceed with mitigation. Would not be required if the mitigation is made an integral part of the proposed action, if it is described in detail to permit reasonable assessment of future effectiveness, and if the agency formally commits to its implementation in the Record of Decision and has dedicated resources for implementation. If private applicant, then mitigation requirement would be legally enforceable under the license or permit.

Comment: We do not agree with this recommendation. Mandating regulation may interfere with tribal sovereignty and the federal government to tribal government relationship. Additionally, current regulations addressing wildlife, etc., include mitigation language with which Tribe comply.

#### **Better federal agency coordination**

Recommendation 6.1: Direct CEQ to promulgate regulations to encourage more consultation with stakeholders. Would require agencies to periodically formally consult with interested parties throughout the process.

Comment: We do not agree with the recommendation to mandate consultation with stakeholders given potential impacts on tribal sovereignty.

Recommendation 6.2: Amend NEPA to codify CEQ regulation 1501.5 regarding lead agencies. Lead agency would be charged with responsibilities of developing consolidated record for NEPA reviews, EIS development and other NEPA decisions.

Comment: This amendment is not necessary. This Committee is unclear on how codifying this language would improve the NEPA process as this language does not differ from current practices.

#### **Additional authority for the CEQ**

Recommendation 7.1: Amend NEPA to create a "NEPA Ombudsman" within the CEQ. Ombudsman would have decision making authority to resolve conflicts within the NEPA process. Purpose would be to provide offset of stakeholder pressure on agencies and to allow the agency to focus on environmental impacts of the proposed action.

Comment: We do not agree with the recommendation to create a NEPA Ombudsman within CEQ. It is not clear in the recommendation the amount and type of authority this position would hold, and where in the process the Ombudsman would fit in. Although a liaison-type position superficially seems beneficial, it could potentially slow down the NEPA process.

Recommendation 7.2: Direct CEQ to control NEPA related costs. CEQ would assess NEPA costs and bring recommendations to Congress for cost ceiling procedures.

Comment: An assessment of NEPA costs and recommendations for cost ceiling procedures is acceptable with this Committee.

### **Clarify meaning of cumulative impacts**

Recommendation 8.1: Amend NEPA to clarify how agencies would evaluate the effect of past actions for assessing cumulative impacts. Would establish that an agency's assessment of existing environmental conditions serve as the methodology to account for past actions.

Comment: We do not agree with the recommendation 8.1. Past actions are already accounted for in assessing current condition. There is no need to clarify that assessment given that current conditions established the NEPA Baseline, as defined by court decree. An attempt to clarify would only add confusion and is redundant at best.

Recommendation 8.2: Direct CEQ to promulgate regulations to make clear which types of future actions are appropriate for consideration under the cumulative impact analysis. Would focus analysis of future impacts on concrete proposed actions rather than on actions that are reasonably foreseeable.

Comment: This Committee does not agree with recommendation 8.2. Defining which types of actions are appropriate to be included in the cumulative impact analysis excessively streamlines the NEPA process. Reasonably foreseeable criteria is very functional and should not be dismissed in favor of concrete proposals.

### **Studies**

Recommendation 9.1: CEQ study of NEPA's interaction with other federal environmental laws. CEQ will conduct a study, within 1 year of the publication of the Task Force's final recommendations, that will evaluate how and whether NEPA and the body of environmental laws passed since it was enacted interact, and to determine the amount of duplication and overlap in the environmental process, and to look at how to eliminate or minimize such duplication.

Comment: This recommendation is not necessary as compliance and interaction is already given in agency handbooks and CEQ guidance documents.

Recommendation 9.2: CEQ study of current federal agency NEPA staffing issues. CEQ to conduct a study (also within 1 year of publication of final recommendations) that details the amount and experience of NEPA staff at key federal agencies and that would recommend measures necessary to recruit and retain experienced staff.

Comment: This Committee agrees that this study may be beneficial. Furthermore, this Committee recommends that this study also examine the level of staff trained and experienced with working with Tribal governments as oftentimes agency employees are not versed in tribal sovereignty and government to government status. This is an additional hindrance in the success of the NEPA process.

Recommendation 9.3: CEQ study of NEPA's interaction with state "mini-NEPAs" and similar laws. CEQ to conduct a study (also within 1 year of publication of final recommendations) that evaluates how and whether NEPA and state mini-NEPAs and similar environmental laws passed since the NEPA enactment interact, and to determine duplication and how to minimize or eliminate such duplication.

Comment: The recommendation to have CEQ study state NEPA laws for the purpose of eliminating duplication is a worthwhile undertaking and should help in identifying and eliminating duplicity among federal and state environmental agencies. With regard to tribal governments, the study should identify and address potential impacts on Tribes, such as legal compliance, constitutional relationships, jurisdictional boundaries, and tribal sovereignty. Any changes in the federal NEPA and state NEPA should not limit or restrict Tribes from enacting their own tribal-specific environmental laws and regulations which govern the protection and enhancement of the quality of the human and physical environment within their homelands.